No. 11859

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

HOBART E. KEITH and LOUISE E. KEITH, His Wife,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division

Rotary Colorprint, 870 Brannan Street, San Francisco 3-30-48—60

No. 11859

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

HOBART E. KEITH and LOUISE E. KEITH, His Wife,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

ATTORNEYS OF RECORD

A. J. HUTTON, ESQ.,

MARION GARLAND, JR., ESQ.,
Dietz Building,
Bremerton, Washington,

Attorneys for Plaintiffs.

J. CHARLES DENNIS, ESQ.,
United States Attorney.

GUY A. B. DOVELL, ESQ.,
Assistant United States Attorney,
324 Federal Building,
Tacoma, Washington,

Attorneys for Defendant,
United States of America.

In the District Court of the United States for the Western District of Washington, Southern Division

No. 1006

HOBART E. KEITH and LOUISE E. KEITH, His Wife,

Plaintiffs,

vs.

THE GOVERNMENT OF THE UNITED STATES OF AMERICA, Doing Business Through a Sub-Agency Known as the PUBLIC ROADS ADMINISTRATION, FEDERAL WORKS AGENCY, DIVISION 8, and FRANK MORSE and JANE DOE MORSE, His Wife,

Defendants.

COMPLAINT

Comes Now the plaintiffs and for cause of action against the defendants herein, allege as follows:

I.

That the plaintiffs were and are residents of the State of Washington, residing near Poulsbo, and on the date of the collision hereinafter referred to, were, and now are the owners of a Ford V-8 automobile involved in said collision hereinafter described. That the defendant, Frank Morse, was on the 9th day of July, 1946, an employee of the

United States of America, working for the Public Roads Administration of the Federal Works Agency and was at the time of the collision hereinafter referred to, the driver of the car which struck the plaintiffs' car and that the said Frank Morse was at the time of the accident, on active duty and working under the direction of the said Federal Works Agency, Division 8, and was driving the equipment of the Federal Government, carrying Government property, and doing Government business.

II.

That this action is brought under the Federal Torts Claims Act, Title 4, Legislative Re-Organization Act of 1946, Public Laws No. 601 of the 79th Congress, Second Session, approved August 2, 1946, and that in accordance with the provisions of said act the plaintiffs duly presented their claim to the appropriate Federal Agency hereinbefore referred to, and said claim was presented on November 8, 1946. A copy of said claim is attached hereto marked Exhibit A, and made part of the complaint set forth herein. The claim was refused by the Agency and returned to the plaintiffs. That subsequent thereto the plaintiffs herein filed with the United States Department of Justice, Washington, D. C., a copy of the claim of the plaintiffs herein, and receipt of the same was acknowledged by John F. Sonnett, Assistant Attorney General, as of December 16, 1946.

III.

That on January 7, 1947, in accordance with the Federal Statute, the plaintiffs herein notified W. H. Lynch, Division Engineer for the Public Roads Administration of the Federal Works Agency at his regular office in Portland, Oregon, and likewise notified John F. Sonnett, Assistant Attorney General, United States Department of Justice, Washington, D. C., that they were withdrawing the claim in order that suit might be instituted thereon after the expiration of the fifteen days' notice. That both notices were sent by Registered mail and more than fifteen days have elapsed since said notice. That in the notice, the Agency and the Attorney General were notified that the claim was in all particulars as previously outlined, with the one exception that the claim was increased to Thirty Thousand Dollars ($30,000), because of Hobart E. Keith's slow recovery, and pain and suffering.

IV.

That on or about July 9, 1946, the plaintiffs were proceeding south of Chehalis, Washington, on the Pacific Highway between Toledo and Chehalis, and at a point which is commonly known as Mary's Corner, where the National Park Highway enters the said Pacific Arterial Highway and forms a T therewith, the plaintiffs' automobile was struck by a car of the United States, driven by the defendant,

Frank Morse, as agent for the United States as more fully appears previously in this complaint.

V.

That at said time and place the plaintiff, Hobart E. Keith, was driving plaintiffs' automobile north toward Chehalis and was on the Pacific Highway which is an arterial highway. The said plaintiff was driving on his right-hand side of the road and had a trailer attached to his car and was driving in a careful, prudent, and legal manner. The car driven by the defendant, Frank Morse, struck the car and trailer driven by the plaintiff, on the right hand side; said car of Frank Morse proceeding in westerly direction off from the National Park Highway and on to the Pacific Highway. That said collision was caused to the negligent and unlawful action of said defendant, Frank Morse, as follows:

1. That the defendant, Frank Morse, entered the Pacific Highway without stopping, although the street was well marked with stop signs, contrary to the laws of the State of Washington.

2. That the defendant, Frank Morse, was driving at an excessive rate of speed estimated in excess of 35 miles per hour.

3. In deliberately striking, when he saw, or should have seen the car and trailer of the plaintiff which was in plain view of the defendant, Frank Morse.

4. In failing to yield right-of-way to the car upon the arterial highway and driving upon his left or wrong side of the Pacific Highway, and driving into and upon the car of the plaintiffs.

5. In failing to make a proper turn from the said National Park Highway, and going upon the Pacific Highway; said turn being improper in that it placed the defendant's car upon the east side of the highway as he was going south.

6. In failing to keep a lookout for users of the highway; in particular the plaintiffs herein.

7. In failing to apply his brakes, when he saw, or should have seen that he was about to strike the car and trailer of the plaintiffs herein.

That all of said negligence herein set forth was the sole and proximate cause of the striking of the two automobiles.

VI.

That as a direct result of said striking of the plaintiffs' car by the defendant's car as above set out, the plaintiffs' car was damaged in that the market value immediately after said collision was the sum of $660.00 less than the market value before the collision; the depreciation in value being due to said collision.

That the personal property of the plaintiffs in the sum of $934.00 was destroyed.

That the earning capacity of the plaintiff, Hobart E. Keith, was the sum of $216.80 per month after all deductions for income tax, social security, and other necessary reductions were made; that as a result of said accident, the plaintiff will lose at least nine months' working time or the sum of $1951.20.

That doctor bills have been paid in the sum of $214.90. That the plaintiff, Hobart E. Keith, was removed to the Naval Hospital in Bremerton, Washington, where it is understood that there will be no charge for future doctor and hospital bills.

That as a result of said collision, Hobart E. Keith was severely injured; he lost two fingers from the left hand and the left wrist became severely mangled, all of which is very painful and caused considerable suffering and required numerous operations and skin draftings, the full extent of which has not yet been determined; and caused pain, suffering, and permanent injury in the sum of $30,000.00.

That the future earning capacity of the plaintiff has been effected in the estimate amount of $7500.00.

VII.

That the plaintiff suffered severe shock and embarrassment, and it has left him in a nervous condition, all his nerves upset, upset stomach, sleep restless, all as a result of said collision.

Wherefore, the plaintiff prays for judgment against the defendants, and each of them, and the

community composed of Frank Morse and Jane Doe Morse, his wife, in the sum of $30,000.00; for general pain, suffering, and special damages in the sum of $11260.10; all in a total sum of $41,260.10.

MARION GARLAND,
A. J. HUTTON,
Attorneys for Plaintiffs.

State of Washington,
County of Kitsap—ss.

Hobart E. Keith and Louise E. Keith, his wife, being first duly sworn, on oath depose and state: That they are the plaintiffs in the above-entitled action; that they have heard read the foregoing Complaint, know the contents thereof, and believe the same to be true.

HOBART E. KEITH,
LOUISE E. KEITH.

Subscribed and Sworn to Before Me this 11th day of February, 1947.

[Seal] A. J. HUTTON,
Notary Public in and for the State of Washington,
Residing at Bremerton.

EXHIBIT A

CLAIM OF HOBART E. KEITH AND LOUISE E. KEITH, HIS WIFE

On or about July 9, 1946, at what is known as Mary's Corner, just south of Chehalis, Washington, the undersigned were driving north in their car with a load of domestic goods, and with their three children, ages eleven, thirteen, and sixteen, when Frank Morse, being then and there in the employ of the United States Government, Public Roads Administration, Federal Works Agency, Division 8, Post Office Building, Portland 8, Oregon, in broad daylight, drove onto the arterial highway from a side road, coming presumably from Packwood, Washington, and without warning, drove into the car occupied by the undersigned claimants and their family; and on account of said action, the undersigned have been damaged to the following extent, as more fully hereinafter set out, and for which they now make claim against the Federal Government, all under Federal Torts Claims Act, Title 4, Legislative Re-organization Act of 1946, Public Law No. 601, 79th Congress, Second Session, approved August 2, 1946:

Personal property destroyed		$ 1,594.00
Damage to Automobile		660.00
	Net	
Nine months' loss of time, earning capacity per mo.	$216.80	1,951.20
Doctors' bills		214.90

These were the preliminary doctors' bills. The main doctor and hospital bills have been supplied at the Naval Hospital, Bremerton, for which we understand there will be no charge.

Pain and Suffering	7,500.00
Numerous operations and skin graftings have been required. The claimant was a carpenter by trade. He lost two fingers of the left hand, the wrist does not as yet move, and there will be a deformity of the wrist, which was mashed severely.	
Loss of earning capacity.....	7,500.00
Total Claim	$19,420.10
Damage to automobile is included in first item above	660.00
	$18,760.10

Dated this 7th day of November, A.D. 1946.

HOBART E. KEITH,
LOUISE E. KEITH,
Claimants.

Subscribed and Sworn to before me this 7th day of November, A.D. 1946.

A. J. HUTTON,
Notary Public in and for the State of Washington, Residing at Bremerton.

Copy received this .... day of November, 1946.

W. H. LYNCH,
Division Engineer, Public Roads Administration, Federal Works Agency, Division 8, Post Office Building, Portland 8, Oregon.

By .....

[Endorsed]: Filed Feb. 21, 1947.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, and for its answer to plaintiffs' complaint alleges as follows:

First Defense

That Plaintiffs' said complaint and bill of particulars fail to state a claim against this defendant upon which the relief prayed for can be granted.

Second Defense

I.

That defendant United States of America admits the allegations contained in paragraphs numbered I, III and IV of said complaint.

II.

Answering Paragraph II of said complaint, this defendant admits that a copy of the claim, a copy of which is thereto attached, was presented to the Federal Agency here involved, but denies that the same was presented in accordance with the provisions of the Federal Torts Claims Act, or that the amount of the claim so presented or thereafter noted at time of withdrawal as alleged in Paragraph III of said complaint was in the extensive sum now claimed in this action.

III.

Answering Paragraph V of said complaint, this defendant admits that plaintiffs' automobile, with trailer, was at the time and place alleged proceeding on the arterial highway as designated in the direction alleged and that at such time and place

defendant's vehicle was being driven by its employee, Frank Morse, onto said arterial highway, but denies that said employee was driving at an excessive speed or that said driver deliberately struck, or that he saw or should have seen the car and trailer of the plaintiffs, or that the same was in the plain view of said driver of the government vehicle; and in this connection the defendant alleges that due to the sun in the west shining against the windshield of defendant's car at the time of day involved that its said driver became partially blinded, thereby and was rendered unable to see the plaintiffs' approaching car at the time he proceeded to drive defendant's car onto said arterial highway, resulting in collision with plaintiffs' car.

IV.

Defendant denies each and every allegation contained in Paragraphs numbered VI and VII of Plaintiffs' complaint, and particularly denies that the Plaintiffs or either of them, have been damaged in the sum of $41,260.10 or in any other sum whatsoever.

Wherefore, having fully answered defendant, United States of America, prays that Plaintiffs take nothing by its complaint herein; that the same be dismissed, and that it may go hence with its costs and disbursements, to be taxed herein as provided by law.

/s/ J. CHARLES DENNIS,
United States Attorney.
/s/ GUY A. B. DOVELL,
Asst. United States Attorney.

[Endorsed]: Filed June 9, 1947.

[Title of District Court and Cause.]

ORDER

This matter coming on for hearing in open court upon the motion of defendants Frank Morse and Jane Doe Morse, his wife, appearing by and through Thomas H. Tongue, III, one of their attorneys, plaintiff appearing by and through Marion Garland, his attorney, and the United States appearing by and through J. Charles Dennis, U. S. Attorney, and Guy A. B. Dovell, Assistant U. S. Attorney, and the matter having been argued by counsel and good and sufficient reasons appearing therefor, it is hereby

Ordered that the complaint in the above-entitled action be and it is hereby dismissed, insofar as said complaint prays for relief against defendants Frank Morse and Jane Doe Morse, his wife.

Dated this 12th day of May, 1947.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

Approved as to form:

/s/ MARION GARLAND JR.,
Of Attorneys for Plaintiffs.

/s/ GUY A. B. DOVELL,
Asst. U. S. Attorney.

Presented by:

THOMAS H. TONGUE,
Attorney for Deft. Morse.

[Endorsed]: Filed May 12, 1947.

[Title of District Court and Cause.]

REPLY

Comes Now the plaintiffs and in reply to the defendants' answer, admit, deny, and allege:

I.

Deny the first offense as set forth in the answer of the United States Government.

II.

In reply to the second offense, plaintiffs allege affirmatively that the procedure set forth in the statute in the presentation of claims was followed particularly and substantially as more fully set forth in the complaint of the plaintiffs.

III.

In reply to Paragraph III, they deny same and allege affirmatively that the same does not state a defense to the plaintiff's complaint.

Wherefore, plaintiffs pray: That the defendant's answer be set aside and held for naught, and the plaintiffs be given judgment as prayed for in their complaint.

/s/ MARION GARLAND,
/s/ A. J. HUTTON,
Attorneys for Plaintiffs.

State of Washington,
County of Kitsap—ss.

Hobart E. Keith and Louise E. Keith, being first duly sworn on oath, each for himself states: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Reply, knows the contents thereof, and believes the same to be true.

/s/ HOBART E. KEITH,
/s/ LOUISE E. KEITH.

Subscribed and Sworn to before me this 26th day of June, 1947.

[Seal] /s/ A. J. HUTTON,
Notary Public in and for the State of Washington,
Residing at Bremerton.

Copy received June 30, 1947.

GUY A. B. DOVELL,
Asst. U. S. Attorney.

[Endorsed]: Filed June 30, 1947.

[Title of District Court and Cause.]

PRETRIAL ORDER

As the result of pretrial conferences heretofore had whereat the plaintiff was represented by Arthur Hutton and Marion Garland, Jr., and the defendant, United States of America, by J. Charles Dennis, United States Attorney for this district and

Guy A. B. Dovell, Assistant United States Attorney, attorneys of record whereupon the following issues of fact were framed and exhibits identified:

Admitted Facts

The following are the admitted facts herein:

1. The Plaintiffs' complaint, paragraphs I, II, III and IV are admitted and paragraph V is admitted, as qualified by the defendants' answer.

Plaintiffs' Contentions

Plaintiffs' contentions are as follows:

1. The only question to be decided is the question of damages to be decided by the Court.

Defendant's Contentions

Defendant's contentions are as follows:

1. Defendant contends the only question of fact is for the Court to decide the matter of damages, the Court having a question of law as to whether or not the sun in one's eyes is excuse for going through an arterial, as set forth in the pleadings:

Issues of Fact

The following are issues of fact to be determined by the Court:

1. The amount of damage the plaintiff, Hobart E. Keith, received.

Issues of Law

The following are the issues of law to be determined by the court:

1. The only issue of law is whether or not sun in one's eyes is excuse for going through a stop light.

Exhibits

The exhibits to be presented at the time of the trial will be the doctor bill in the sum of $214.90, and the doctor and hospital records from the U. S. Naval Hospital at Bremerton, Washington, also the records of the Puget Sound Naval Shipyard, Keyport Torpedo Station, pertaining to the work record of the plaintiff, these exhibits to be used for both the plaintiff and the defendant and to be entered by stipulation.

Attorneys' Stipulation

It is stipulated by the attorneys of record that the question of damage shall be proven as follows:

1. That the records of the Puget Sound Naval Hospital at Bremerton, Washington, will be subpoenaed, and a competent doctor designated by the Naval Hospital Commander who is familiar with the case, shall also be subpoenaed, together with any and all other records pertaining to the plaintiff's physical condition; also, the plaintiff agrees to hold himself available for inspection by any other doctor the government may suggest at any time before trial, and that the plaintiff shall have the right

to have the medical testimony of one doctor other than herein designated.

It is further stipulated that the loss or damage of personal items shall be proven by the testimony of the plaintiffs and that the pain and suffering and other items of personal damage shall be limited to testimony of the plaintiffs and their immediate families.

Action of the Court

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this Order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by agreement of the parties to prevent manifest injustice.

Dated at Tacoma, Washington, this 13th day of August, 1947.

/s/ CHARLES H. LEAVY,
United States District Judge.

Form Approved Provided approved by Government and we are notified before August 20, 1947.

/s/ A. J. HUTTON,
/s/ MARION GARLAND JR.,
Counsel for Plaintiffs.
/s/ J. CHARLES DENNIS,
United States Attorney.
/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Counsel for the Defendant, United States of America.

[Endorsed]: Filed Sept. 13, 1947.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter coming on regularly to be heard before me on the 18th and 19th days of September, 1947; the plaintiffs being present in Court and represented by their attorneys, Arthur J. Hutton and Marion Garland, Jr.; the defendant, United States of America, being represented by its attorney, Harry Sager; the court having heard the testimony of witnesses and the argument of counsel and having announced its Findings orally, does hereby make the following

FINDINGS OF FACT

I.

That the plaintiffs were and are residents of the State of Washington, residing near Poulsbo, and on the date of the collision hereinafter referred to were, and now are, the owners of a Ford V-8 automobile involved in said collision hereinafter described. That the defendant, Frank Morse, was on the 9th day of July, 1946, an employee of the United States of America, working for the Public Roads Administration of the Federal Works Agency, and was at the time of the collision hereinafter referred to, the driver of the car which struck the plaintiffs' car and that the said Frank Morse was, at the time of the accident, on active duty and working under

the direction of the said Federal Works Agency, Division 8, and was driving the equipment of the Federal Government, carrying Government property, and doing Government business.

II.

That this action is brought under the Federal Torts Claims Act, Title 4, Legislative Re-Organization Act of 1946, Public Laws No. 601 of the 79th Congress, Second Session, approved August 2, 1946, and that in accordance with the provisions of said Act the plaintiffs duly presented their claim to the appropriate Federal Agency hereinbefore referred to, and said claim was presented on November 8, 1946. That said claim was duly rejected as provided by law and that as stipulated by the United States Attorneys and incorporated in the Pretrial Order, all procedural matters for bringing said matter to court were done according to law.

III.

That on or about July 9, 1946, the plaintiffs were proceeding south of Chehalis, Washington, on the Pacific Highway between Toledo and Chehalis, and at a point which is commonly known as Mary's Corner, where the National Park Highway enters the said Pacific Arterial Highway and forms a T therewith, the said Plaintiffs' automobile was struck by a car of the United States driven by the defendant, Frank Morse, as Agent for the United States.

IV.

That at said time and place the plaintiff, Hobart E. Keith, was driving plaintiffs' automobile north toward Chehalis and was on the Pacific Highway which is an arterial highway. The said plaintiff was driving on his right-hand side of the road and had a trailer attached to his car and was driving in a careful, prudent and legal manner. The car driven by the defendant, Frank Morse, struck the car and trailer driven by the plaintiff, on the right hand side; said car of Frank Morse proceeding in westerly direction off from the National Park Highway and onto the Pacific Highway. That said collision was caused to the negligent and unlawful action of the said defendant, Frank Morse, as follows:

1. That the defendant, Frank Morse, entered the Pacific Highway without stopping, although the street was well marked with stop signs, contrary to the laws of the State of Washington;
2. In failing to keep a lookout for users of the highway, in particular the plaintiffs herein;
3. In failing to apply his brakes, when he saw, or should have seen, that he was about to strike the car and trailer of the plaintiffs herein.

That all of said negligence herein set forth was the sole and proximate cause of the striking of the two automobiles.

V.

That as a direct result of said striking of the plaintiffs' car by the defendant's car as above set forth, the plaintiffs' car and personal effects were damaged in the total sum of seven hundred and fifty ($750.00) dollars; that the plaintiff, Hobart E. Keith's, left arm was mangled causing him damage in the further and following amounts: Loss of earnings on behalf of the *defendant,* Hobart E. Keith, both past and future, in the sum of five thousand ($5000.00) dollars (said $5000.00 exclusive of compensation due plaintiff for other United States services); the said Hobart E. Keith will need medical care, which he cannot receive from the United States Government under any of his present preferences, in the sum of seven hundred fifty ($750.00) dollars and that the *defendants* are further damaged in general damages for shock, pain, embarrassment, suffering, disfigurement, maiming and all other injury in the sum of nine thousand, six hundred ($9,600.00) dollars or in a total amount of sixteen thousand, one hundred ($16,100.00) dollars.

VI.

That the sum of fifteen (15%) per cent of the total damage done the plaintiffs is a reasonable sum to allow A. J. Hutton and Marion Garland, Jr., as attorney's fees.

Done in Open Court this 6th day of Oct., 1947.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

From the foregoing Findings of Fact the Court makes the following:

CONCLUSIONS OF LAW

I.

That the defendant, United States of America, has damaged the plaintiffs in the sum of sixteen thousand, one hundred ($16,100.00) dollars for which the plaintiffs are entitled to judgment, together with Court costs, as provided by law.

II.

That the sum of fifteen per cent (15%) of the total judgment, or the sum of two thousand, four hundred and fifteen ($2,415.00) dollars, should be allowed as attorneys fees unto Marion Garland, Jr., and Arthur J. Hutton, same to be paid from the damages as received by the plaintiffs.

Done in Open Court this 6th day of Oct., 1947.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

10/6/47

Defendant excepts to the foregoing Findings and Conclusions of Law and exceptions allowed.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

[Endorsed]: Filed Oct. 6, 1947.

In the District Court of the United States for the Western District of Washington, Southern Division

No. 1006—Tacoma

HOBART E. KEITH and LOUISE E. KEITH, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA d/b Through a Sub-Agency Known as the PUBLIC ROADS ADMINISTRATION, FEDERAL WORKS AGENCY, DIVISION 8; and FRANK MORSE and JANE DOE MORSE, His Wife,

Defendants.

JUDGMENT

This Matter having come on regularly to be heard before me on the 18th and 19th of September, 1947; the plaintiffs being present in Court and represented by their attorneys, A. J. Hutton and Marion Garland, Jr.; the defendant, United States of America, being represented by its attorney, Harry Sager; the court having heard the testimony of witnesses and the argument of counsel; having made its Findings of Fact and Conclusions of Law and being fully advised in the premises; it is hereby

Ordered, Adjudged and Decreed that the plaintiffs have judgment against the defendant, United States

of America, in the sum of Sixteen Thousand, One Hundred ($16,100.00) Dollars, together with costs, as provided by law, in the sum of $62.80, making a total judgment in the sum of $16,162.80.

($).

It is further

Ordered, Adjudged and Decreed that the plaintiffs' attorneys, A. J. Hutton and Marion Garland, Jr., receive from the plaintiffs the sum of fifteen per cent (15%) of their total judgment as attorney's fees, or the sum of Two Thousand, Four Hundred and Fifteen ($2,415.00) Dollars; same to be paid from the moneys received on this judgment.

Done in Open Court this 6th day of October, 1947.

CHARLES H. LEAVY,
U. S. District Judge.

10/6/47.

Defendant excepts to the foregoing Judgment and exceptions allowed.

CHARLES H. LEAVY.

Judgment entered on Civil Docket VI, Oct. 6, 1947.

[Endorsed]: Filed Oct. 6, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That the United States of America, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 6, 1947, in favor of the plaintiffs in said action, and against the said defendant, the United States of America; and from the whole thereof.

Dated this 2nd day of January, 1948.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Assistant United States Attorney.

Attorneys for Appellant, United States of America.
Address: 324 Federal Building, Tacoma 2, Washington.

Copy of the foregoing Notice of Appeal mailed to Messrs. Marion Garland, Jr., and A. J. Hutton, Attorneys for Plaintiffs, at Dietz Building, Bremerton, Wash., this 2nd day of January, 1948.

E. E. REDMAYNE,
Deputy Clerk.

[Endorsed]: Filed Jan. 2, 1948.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The following is a statement of points on which appellant intends to rely on appeal.

1. That the District Court, in rendering judgment for plaintiffs, erred in allowing attorney's fees in addition to an award of damages, and in entering judgment in the aggregate amount including the allowance for attorney's fees.
2. That the judgment of the District Court is excessive in the sum of $2100.00, the amount of the attorney's fees allowed in addition to the amount of damages awarded to the plaintiffs.

Dated this 21st day of January, 1948.

/s/ J. CHARLES DENNIS,
United States Attorney.
/s/ GUY A. B. DOVELL,
Assistant United States
Attorney.

Received a copy of the within statement of points this 26th day of January, 1948.

/s/ MARION GARLAND, JR.,
/s/ A. J. HUTTON,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 27, 1948.

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF RECORD ON APPEAL

To the Clerk of the above-entitled court:

The defendant United States of America, herewith designates the following portions of the record and proceedings to be contained in the record on appeal:

1. Complaint.
2. Answer.
3. Order entered May 12, 1947, dismissing individual defendants.
4. Reply.
5. Pre-trial Order.
6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Transcript of court's Oral Opinion.
9. Notice of Appeal.
10. Statement of Points.
11. This Designation.

Dated this 21st day of January, 1948.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Assistant United States Attorney.

Received a copy of the within designation this 26th day of January, 1948.

/s/ MARION GARLAND, JR.,
/s/ A. J. HUTTON,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 27, 1948.

[Title of District Court and Cause.]

PLAINTIFFS' DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the above-entitled court:

The Plaintiffs, Hobart E. Keith and Louise E. Keith, herewith, in addition to the designation of the contents of record set forth by the defendant, United States of America, through a sub-agency known as the Public Roads Administration, Federal Works Agency, Division 8, designates the following portions of the record and proceedings to be contained in the record on appeal:

1. An enlargement of Designations Nos. 6 and 7 of the defendants, by supplementing the same with the statement of counsel for the respective parties and all comments of the Court at the time of signing the Judgment.

Dated this 31st day of January, 1948.

/s/ A. J. HUTTON,
/s/ MARION GARLAND, JR.,
Attorneys for Plaintiffs.

Received a copy of the within designation this 2nd day of February, 1948.

/s/ J. CHARLES DENNIS,
United States Attorney.
/s/ GUY A. B. DOVELL,
Assistant United States Attorney.

[Endorsed]: Filed Feb. 2, 1948.

[Title of District Court and Cause.]

RE-STATEMENT OF POINTS

The following is a re-statement of the points to be considered on appeal:

1. Was the Court correct in his decision that at any time before signing the Findings and Conclusions of Law and Judgment, it was not only his right, but his duty, to consider the entire record and law in determining the amount of damages that should be awarded the plaintiffs.

Dated this 31st day of January, 1948.

/s/ A. J. HUTTON,
/s/ MARION GARLAND, JR.,
Attorneys for Plaintiffs.

Received a copy of the within re-statement of points this 2nd day of February, 1948.

J. CHARLES DENNIS,
/s/ GUY A. B. DOVELL,
Attorneys for Defendant,
United States of America.

[Endorsed]: Filed Feb. 2, 1948.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT OF THE RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript, consisting of pages numbered 1 to 29, inclusive, together with the original Reporter's Transcript of the Court's oral Opinion (after trial), consisting of pages numbered 1 to 18, inclusive, and original Reporter's Transcript of Proceedings (of October 6, 1947), consisting of pages numbered 1 to 10, inclusive, is a full, true and correct record of so much of the papers and proceedings in Cause No. 1006, Hobart E. Keith and Louise E. Keith, his wife, Plaintiffs, vs. The Government of the United States of America, doing business through a sub-agency known as the Public Roads Administration, Federal Works Agency, Division 8, and Frank Morse and Jane Doe Morse, his wife, Defendants, as required by the Designation of the Contents of the Record on Appeal of the defendant United States of America, and the additional Designation of the Plaintiffs, now on file and of record in my office at Tacoma, Washington, and the same constitute the complete Record on Appeal from the Judgment of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the original Reporter's Transcripts, above referred to, have this day been transmitted to the United States Circuit Court of Appeals at San Francisco.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation of the aforesaid Record on Appeal, to-wit:

Appeal fee	$ 5.00
Clerk's fee for preparation of Record on Appeal	8.50
	$13.50

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 13th day of February, 1948.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

In the District Court of the United States for the Western District of Washington, Southern Division

No. 1006

HOBART E. KEITH, et ux.,

Plaintiffs,

vs.

GOVERNMENT OF THE UNITED STATES OF AMERICA, Doing Business Through PUBLIC ROADS ADMINISTRATION, FEDERAL WORKS AGENCY, and FRANK MORSE, et ux.,

Defendants.

TRANSCRIPT OF COURT'S ORAL OPINION
(After Trial, Sept. 19, 1947)

The Court: This accident, the first of its nature that this Court has had to concern itself with since the enactment of this Federal Torts Claims Act, and conclusions that we arrive at cannot be based therefore upon any previous experience that we have had along those lines.

In determining what award should be made in a case of this nature, I think it is appropriate to take into consideration the history and background that gives rise to this legislation. The legislation itself is not an independent enactment, but it is only a part of the general reorganization act of Congress passed by the 79th Congress, and it is made a part of that act. I think part three and possibly four, in the whole act.

The plaintiff in this case, as every other citizen and person, had no right of action at all against the United States until this law became effective. The only relief so far as an injured person would have against the Government until the effective date of this law, was by filing a claim in—with the Congress. That in turn was submitted to the Claims Committee, and it was either allowed or disallowed. Those claims had their origin in both houses of Congress. The reorganization act abolished the Claims Committee. One of the arguments for the abolition of these committees in the respective houses, was that the awards made were frequently entirely out of line with what would have been just and fair. In some instances they were terribly exaggerated; in others they were greatly minimized; then in others with great merit, they were totally disallowed. Because the Legislative Branch of the Government had and has so many obligations and duties, they could give but a very limited consideration to claims against the Government, and the successful prosecution of a claim depended largely upon the Member of Congress who sponsored it and his presentation of it. It was presented ex parte and rather informally.

In order to relieve Congress of this terrific burden, and to assure a higher degree of justice, the provisions were made whereby the agency involved itself, if there was a minor loss, could determine what it should be, up to a thousand dollars. If there was a loss that went beyond that, the Federal District Courts were given jurisdiction. Action was

to be treated as an action at law, though in fact it is not such, because an action at law would entitle the plaintiff to a trial by jury.

The law makes other restrictions, such as denying the injured person a right of action against the individual or individuals who were directly and proximately the cause of their injury and damage. By instituting an action such as the plaintiff has here, he has waived and lost his right to sue the individual who operated the Government vehicle.

I mention those things because the approach to fixing damages must be somewhat different from that in an ordinary tort action where the amount of damage is fixed either by the jury or the Court.

In this case there is no question of the negligence at all, and no issue of contributory negligence. In fact, the Government saw fit not to offer any evidence whatever that would be even remotely extenuating, and the evidence as disclosed here is that it could not well have done so. The accident clearly was one of not even ordinary negligence or failure to do what a careful and prudent person would have done under the same or similar circumstances, but it was the grossest kind of negligence on the part of the operator of the Government vehicle.

It is true that the pretrial order recites that it is the contention of the defendant that the operator of this vehicle was driving with the sunlight in his eyes, but the evidence is undisputed here that he disregarded the entrance on an arterial highway which was well marked with warning signs and a stop sign, and I would have no hesitancy in finding

if there were an issue made, that he came through that stop sign without stopping, because he would not have been able to have struck the plaintiff's car with the force and violence that he did, which was sufficient to turn his own car half way around and head it back in the direction in which it came. So he must have gone through that stop sign. The fact that the sun was shining in his eyes is a matter that was, of course, not in his control, but called for a high degree of vigilance and care, just as fog would, or rain would, or anything else. The evidence indicates clearly that he did not exercise even the most ordinary care under the existing circumstances.

The miracle of the whole situation is that all of these people were not severely injured or some of them killed. But happily and fortunately for the wife and the three children in the car, they apparently were not hurt at all, or not sufficient to justify them in presenting any claim.

The plaintiff, Keith, did suffer severe injuries. The Government has made no effort to minimize it. It has been extremely fair in presentation of the matter in cross-examining witnesses called by the plaintiff. He made a remarkable recovery physically, and from what medical testimony we have there are possibilities of recurrency by—some time in the future suffering from an osteomyelitis, I think they designated it, that might result in an amputation of the arm, but those are speculative and I shall not take them into consideration in measuring the damages.

The plaintiff gives every indication of suffering mentally or psychologically, whatever would be the proper term to designate a mental condition. The doctor that he called here, who is an expert in that field, states that there is substantial reason to believe that with a proper personal relationship and a sufficient degree of confidence on the part of the plaintiff, Keith, with his physician, within a year's time he ought to be well along toward the road to recovery from this existing mental condition, which is due, in part, to his age and in part to this accident.

I am inclined to feel and believe, and shall make an award for allowing a sum that will grant him treatment along psychiatric lines in connection with his present condition. One who suffers from a mental state cannot be judged by the rest of us very well, or not nearly so well as we could if it were a physical condition, nor if it were an objective symptom as distinguished from a subjective symptom. We might be inclined to suspicion malingering. One might be inclined to believe that this is a case, where after an award was made and a collection of damages was had, that there would be a rapid recovery from the mental state.

I do not feel that such is the situation in this case. I watched the plaintiff quite closely in the courtroom and on the witness stand, and I am of the opinion that, to him his troubles are real, though to his physicians and probably others they would appear to be a type of psychosis or nervous-

ness. Probably psychosis is a little too strong a word. Psycho-neurotic, I think, is the term that the doctors use. For that reason, I feel there should be some award made that will allow for treatment.

Now as to the nature of the disability, it is undisputed that his disability in this left hand and arm is at least ninety per cent and permanent. The evidence is quite convincing that he never again can follow his occupation as a carpenter. He might direct carpenter activity, and he might do some minor carpenter work, but he is left now with a thumb and two fingers on his left hand, with wrist permanently damaged and even the forearm damaged. My recollection of the testimony is that he can't bring his second finger in contact with this thumb at all after almost a year and a half, and the same is generally true of the first finger, so he couldn't hold a nail, couldn't do many of those things that a carpenter would have to do.

The amount of an award that can be made for that type of permanent injury is one that is difficult because we have no definite standard to go by. The State of Washington, as I tried to hurriedly check up, or have my law clerk check, allows a maximum of thirty-six hundred dollars for the loss of an arm, or use of an arm, as a permanent partial disability and final settlement for such loss.

That he has lost a considerable amount of earning and will continue to, at least for a period somewhere from nine months to a year from this date, there is no question. His earnings were in the

neighborhood of eleven dollars and eighty cents a day, subject to certain deductions. That loss began about December the first, 1946, or late in November, when he had used his sick leave and his permanent leave. It could be argued, and probably the Court would be inclined to instruct the jury if they were measuring damages, or would himself if this were an action against a private individual, approach it from a somewhat different angle, that he sustained a loss from the date of the accident to the end of the period when he drew his wages as sick leave and accumulated leave, which would have to be compensated for because he had earned this time. But in a case of this nature, where the Government is the pay for the wages, and where the Government would become the judgment debtor, I think the approach should be made from the date when he ceased to draw wages, up to a time when he probably can gainfully employ himself again. And it is upon that basis that I shall make my calculation.

Now, as to the loss of personal property and damage to the automobile, I shall generally accept the automobile value based upon—or loss based upon the value that the son, who at one time had an interest in it, fixed, which was four hundred and fifty dollars. The O.P.A. price at that time, if it had been sold at ceiling price immediately preceding the accident, was possibly eight hundred and fifty dollars.

And as to the personal property involved, I feel that the value has been greatly overestimated by Mrs. Keith. It couldn't be fixed by what it would cost to go out and buy it new, and yet it's undisputed that the little trailer was a total loss and likewise a good part of the personal property, bedstead, spring or mattress, some of the suitcases and the clothing and other things, but an allowance far less than that which is claimed, will have to be made.

And then we come to the item that really is the major item here, and that is general damages for pain and suffering, for the permanent partial disability, for the disfigurement, and the mental anguish that has been sustained to date and that doubtless will for some time in the future. And here, again, is a difficult item to fix with any degree of certainty. I am sure that if these plaintiffs had been relegated to filing a claim with the Congressional Claims Committee, that item would not have begun to receive the consideration that it was entitled to because the members of the Claims Committee could not possibly have the picture that the Court gets after hearing and seeing. Usually these claims bills probably would receive from thirty minutes to forty-five minutes' consideration in each house. To allow much greater time, would make it impossible for Congress to get their business transacted.

The suggestion that there are minor children and that their welfare should be taken into consideration in an award here, must be discarded. If

this were a death loss it would have a place; but not being such, I feel I cannot give it consideration.

In approaching the whole matter and in fixing amounts, the Court has given serious consideration to the cases that have been submitted by counsel for the Government as to sums approved by the Court of last resort in this state. They are all cases wherein the Court refused to disturb the verdict as being an excessive one. This case of Long vs. Thompson, an accident somewhat similar to the accident we have here, the man was 52 years of age and was a blacksmith and the injury resulted in a total incapacitation so far as following his trade was concerned. The jury allowed ten thousand dollars. The Court said that didn't appear to be excessive. It is found in 177 Wash. on 296, and decided in 1934. The next case cited is Hirst vs. Standard Oil Company, 145 Wash. 597, where the recovery was eleven thousand a hundred eighty dollars and forty cents. It grew out of an automobile collision, and the left arm, as in this case, was so badly injured that it had to be amputated entirely. And in that connection, I may say that the plaintiff in that case perhaps did not suffer the pain that the plaintiff in this case, by reason of efforts here made to save the hand and arm, and the long hospitalization. This case discloses a hospitalization of better than six months, and a type of treatment employed that a mere description of it causes a person to feel pain, where the penetration of the bones on the fingers remaining and the hand, and the application of the wires to hold the parts in place was necessary. This Hirst case was decided in 1927.

The next case cited is Ekeberg vs. Tacoma, 142 Wash. 240. This case was likewise decided in 1927. Tacoma, a municipal corporation, was made the defendant and the verdict there was for thirteen thousand dollars, and the injury was substantial.

In addition, I have had my clerk check up to find additional cases that might be somewhat similar. I find the case of Johnson vs. Burnham, 198 Wash. 500, which was decided in 1939, where the jury awarded twenty-one thousand one hundred dollars for injuries and hospitalization, to a carpenter who was 50 years of age, and his earnings were between two and three hundred dollars a month. He suffered a compound fracture of the left leg, and there was a showing made that this might flare up and cause an amputation and that the loss was from twenty-five to fifty per cent. That verdict was sustained.

But, back as early as 1920 the Supreme Court of this state said in determining, that's in the case of McCreedy vs. Fournier, 133 Wash. 351, "In determining whether an award for damages for personal injuries, largely of a permanent character, is excessive the Courts must to some extent take into consideration the present-day conditions and factors which differ from those prevailing a few years earlier."

I call attention to this last case because I think that is a very sound expression of law in an action of this nature. We must take into consideration, now, the value of a dollar, and we should determine

judicially, because it is known to everyone, whether judge, lawyer, or otherwise, that a dollar is very cheap as compared to a dollar ten years ago. It is not for the Court to determine that this situation is always going to prevail, but it does prevail now and doubtless will for some time to come, and an award of five thousand dollars made ten years ago is little more—I'm being very conservative in my estimate—than an award of seventy-five hundred or eight thousands dollars would be now.

I take into consideration those factors in making the award here, and while I—I am trying to state, as I did at the outset, no determination of the amounts to be awarded as compensation can ever be set by anyone to be exactly right or exactly just.

I am going to allow in this case for loss of earnings over the period of time that the evidence indicates that this plaintiff has been and will be unable to work, the sum of five thousand dollars; for his medical care and attention, seven hundred and fifty dollars; for loss and damage to the automobile and his personal property, seven hundred and fifty dollars; and general damages for permanent disability, pain and suffering and future loss of earnings, the sum of seven thousand five hundred dollars; making a total of fourteen thousand dollars. Now, in addition thereto, I shall allow as the law provides, an attorneys' fee in the sum of fifteen per cent, which would be two thousand one hundred dollars, making a total award and judgment of sixteen thousand one hundred dollars.

Mr. Sager: If your Honor please, the law does not authorize the allowance of attorneys' fees in addition to the judgment.

The Court: That's the way I read the statute, but we'll read it again. I read it first probably a little hurriedly.

Section 422 of the act, "A Court rendering a judgment for plaintiff pursuant to part three of this title, or the head of a Federal agency or his designee, making an award pursuant to part two of this title, or the Attorney General making a disposition pursuant to Section 413 of this title, as the case may be, may, as a part of the judgment, award or settle judgment, award or settlement, determine and allow reasonable attorneys' fees, which if the recovery is five hundred dollars or more, shall not xeceed ten per cent of the amount recovered under part two, or twenty per cent of the amount recovered under part three, to be paid out of but not in addition to the amount of the judgment or award and settlement."

That language makes your position sound, Mr. Sager, but I will accomplish the same purpose by making an allowance of sixteen thousand dollars and provide for a fifteen per cent attorneys' fee, as I intend to allow the plaintiff approximately fourteen thousand dollars net as his loss.

I feel that there should be a net award of this fourteen thousand. What the Court has in mind is the hope that after the expenditure of a reasonable amount of this money that this individual might follow such a course as to be able to make a living,

since in all probability he will never be able to be reassigned to the position that he has had with the—in the Navy Department.

Mr. Sager: And the costs——

The Court: Well, yes, the usual costs, but no interest on any amount here. The act provides that interest may not be allowed, that is, up to the date of recovery.

Mr. Hutton: It is a matter of law.

The Court: That's my view of it. Of course, Congress has to make an appropriation, or has to have an appropriation to pay—you can't levy upon any government property for collection of this money.

Mr. Hutton: We understand it will take some years before we get it, your Honor——

The Court: Yes, I don't know just when you will——

Mr. Hutton: There might be certain questions of minor importance in regard to the cost bill, but I suppose those will come up when we submit the costs. The service, of course——

The Court: Your attorneys' fees award would be slightly more in this manner than they would be as calculated on the fourteen thousand dollars.

Mr. Hutton: I was—I appreciate that, and I appreciate the decision of the Court, naturally, in the way it has been analyzed by the Court, but these other items that have been somewhat costly, that is of course, of having service made on parties, that would go in the regular cost but we will discuss those at the time.

The Court: Well, no, they wouldn't—you couldn't include—I don't know just what you mean by other items. The travel back and forth?

Mr. Hutton: Oh, no. No, no. I mean money we actually paid out in this Court and to the Marshal, and so forth.

The Court: Oh, those are proper items.

Mr. Hutton: That's all that I——

The Court: But the major item of allowance here for general damage, pain, suffering through future loss, covers——

Mr. Hutton: Oh, yes. No, there was no thought in my mind in regard to that. The items consist—well, I will be specific about it, your Honor. There might be some question with regard to this man Morse, but we thought that he should be a party, and he was served at a cost of about $29.50, and it is just the regular things that go in a cost bill, and that might be settled later, your Honor.

The Court: No, I will be prepared to settle it now.

Mr. Hutton: Well, I——

The Court: But you—I think the better way for you to do is to prepare and serve and file a cost bill.

Mr. Hutton: If your Honor please, there is something outside that I have to run across before, maybe your Honor is familiar with. We will, of course, submit to our client a cost statement, and I don't want to do what your Honor thinks isn't right by the client. Among other things, it cost for the doctor's testimony, one hundred dollars. Would that—things of that nature, would that be a proper

item of expense in figuring before we give our client his share? I imagine it would be, but I want to be fair with the Court in getting this person what monies you think are coming to him.

The Court: Well, I don't like to rule definitely. Off hand, it seems to me it would. This statute is penal in its nature, relative to overcharges for attorneys' fees.

Mr. Hutton: I understand that, your Honor.

The Court: And counsel will have that in mind, but there is no thought in allowing a fifteen per cent attorneys' fee to have that cover the costs, which are chargeable under the statute.

Mr. Hutton: We will go over the statute, your Honor.

The Court: Now you had better prepare findings and conclusions of law and judgment, and submit those, and of course the item of costs will be dependent upon the determination there if there is a dispute between the parties. And I suggest your findings would be properly presented some Monday morning which is a law day.

Mr. Hutton: This coming Monday morning?

The Court: Well, if you desire, you may, but I——

Mr. Hutton: I doubt the possibility of our preparing——

The Court: No, there is no reason. Why, any Monday morning.

Mr. Hutton: I see. That is our regular law day in Kitsap County for all the lawyers over there, but one of us will come down and take care of it.

[Endorsed]: Filed Feb. 12, 1948.

In the District Court of the United States for the Western District of Washington, Southern Division

No. 1006

HOBART E. KEITH, et ux.,

Plaintiffs,

vs.

GOVERNMENT OF THE UNITED STATES OF AMERICA, Doing Business Through PUBLIC ROADS ADMINISTRATION, FEDERAL WORKS AGENCY, and FRANK MORSE, et ux,

Defendants.

TRANSCRIPT OF PROCEEDINGS ON OCTOBER 6, 1947

The Court: Docket 1006, Hobart E. Keith and wife versus government of the United States.

Mr. Garland: Your Honor please, rather than taking judgment together with costs, I submitted my cost bill over five days ago, and would like to have that matter decided and the costs in the total judgment. The reason for this is the collection will be made from the United States, and sometimes their officials don't understand the adding the costs when the Judge gives judgment for so much.

If you will notice on page 1, about lines 20——

The Court: Yes, I see.

Mr. Garland: Yes, Well, on the cost bill, the United States Attorney and I are agreed except for

the second, third and fourth items. Those have to do with the serving of a Frank Morse who was dismissed from the case. If your Honor remembers, he was dismissed because of your Honor's opinion that he was not a necessary party. Since your Honor's decision there have been a lot of cases, and there was a complete review of them in the last issue of "The American Bar Journal." It held that about half the courts held the party in a similar situation was, and about half the courts held they weren't. There is no court that would be binding upon your Honor has yet passed on the subject, that I know.

Now in this particular case on the Court's ruling they were not necessary costs, but we were in the position of not knowing whether they would be or not when we started this lawsuit. They amount to $36.51. Therefore, the judgment that your Honor enters will be either $16,162.80 or $16,199.37, depending on whether you allow those as taxable costs, or not, and I have no—it is entirely in your Honor's discretion there, and whether he was a necessary party to bring this action or not. You ruled once, so——

The Court: The statute, however, expressly provides that no judgment can be taken against the individual, and that an action of this kind bars a subsequent action against the individual. Isn't that correct?

Mr. Garland: That is correct. Your Honor will either let me fill in the judgment, or fill it in yourself for sixteen thousand one hundred and——

The Court: What about the other items, Mr. Sager, do you have any objection?

Mr. Sager: The cost bill?

The Court: Yes.

Mr. Sager: No, I haven't any objection except as to this item. I do want to make some objection to the findings.

The Court: Very well.

Mr. Sager: I think in general the judgment and the findings are in accord with your Honor's oral ruling. I think on page 3 of the findings, sub-paragraph 3 is not in accordance with the testimony. I don't know that your Honor made any special finding in regard to that factor. The finding is in failing to apply his brakes when he saw or should have seen that he was about to strike the car and trailer of the plaintiffs herein.

Now as I recall the testimony, the plaintiff's testimony, through the witness Billings, I believe, one eye witness to the accident other than the plaintiff and members of his family, that he said obviously from the skidmarks on the pavement, the government car had applied its brakes very vigorously in an attempt to stop, so it seems to me that finding is not in accord with the evidence.

Now, except for that finding, I think the rest of the findings are in accordance with your Honor's ruling.

I wish to take exception, however, to the finding number 5, in the computation of the amount of the total judgment. It allows a figure of $9,600.00 for general damages and suffering, and disfigurement

and so forth. Now in that item there has been included the award of attorneys' fees, because when your Honor first announced its computation in the judgment that you allowed $7500.00 for those elements of damage, and of course for the same reasons I think the judgment is in error in allowing a total of sixteen thousand one hundred, which in effect includes an addition of attorneys' fees, over and above the amount the Court first found as having been the amount of damages. I think the statute is clear that attorneys' fees while fixed by the Court, are not to be in addition to the judgment. They are to come out of the judgment, and I think that it is error to incorporate them in as part of the total judgment, and the obvious effect is to allow them as attorneys' fees. I think the judgment should be reduced by that amount. The original amount the Court found as having been—in measuring the damage of the defendant,—or of the plaintiff.

The Court: Mr. Sager, it became entirely a matter of calculation, and the Court stated expressly at the time I had misread the statute with reference to the attorneys' fees. I was under the impression that the attorneys' fees were in addition to the award to be made to the injured party. Upon that being called to the attention of the Court, and a rereading of the statute, I was satisfied that such was the situation, but still of the opinion that the injured party was entitled to an award of approximately fourteen thousand dollars, net, and not fourteen thousand dollars from which there should be deducted attorneys' fees.

I was further of the opinion that an attorneys' fee in the sum of fifteen per cent was a reasonable attorneys' fee under all of the facts and circumstances in the case.

Now there was no intention that the attorneys' fee should be added as such to the last item, but it all comes out the same if it were broken down, and the sum were added to these various items. In other words the statute is not to be so rigidly construed as to make it impossible for the Court to take into consideration what the award and attorneys' fee is going to be when making the award for the loss sustained, and that would be the effect of the position you take, because the Court might have made an error in calculation or in interpretation, it would become a situation, if your position were sound, where the Court could never correct such an error and was forever bound by it.

Now technically it may be that this award should be scattered through the various items, but the result would be the same.

Mr. Sager: Well, of course my—the reason I raise the point at this time is that I think the effect of this judgment is to do what the statute says cannot be done, to allow an attorneys' fee over and above the actual amount of damage that the Court found the man had suffered.

The Court: The statute certainly doesn't say that the Court cannot exercise its discretion and allow an award, and out of that award there be attorneys' fees, and in calculating it that the court could not take into consideration what he proposed to leave as the net amount for the injured party.

Mr. Sager: Of course, the Court in the first instance, under the statute, is to find the amount of damage the person suffered; the amount of loss that he sustained. Now that is not—that is not affected one way or the other by attorneys' fees. He either suffers $14,000 damages or he suffers $16,000 damages. That is the actual loss that he has sustained.

The Court: I think, Mr. Sager, I stated—and of course it is a matter of common knowledge, that when we come to measure in dollars and cents human sufferings and injuries, there can be no standard by which we measure it with exactitude, and there is plenty in this record to warrant a finding of $16,000 in damages in the aggregate, and that is the position the Court has taken.

Mr. Sager: Well——

The Court: The fact that I, under a misapprehension, used the figure $14,000, and of the opinion that added to that would be attorneys' fees, but always with knowledge that the attorneys' fees were a part of the item of allowance, and then corrected it and made it $16,000, it is, it seems to me, rather extreme technical grounds that the objection is made.

Mr. Sager: The Court's misapprehension was not as to the amount of damage suffered by the defendant—or by the plaintiff. The Court's misapprehension was to the effect of the statute in allowance of fees.

The Court: No, I expressed then and I will express now, so that you will have it clear in the record, that the defendant suffered damages in loss

of property and personal injuries, and pain and suffering, and permanent disability, in the sum of $16,000.00.

Mr. Sager: Well, of course that was not the Court's first finding. The Court's first finding was that——

The Court: Well, it would be an unhappy situation if the Court were always bound by statements made if they were—if later he felt he was in error about it. In fact there is nothing in this case now that would bar the Court even upon its own initiative, if he felt in good conscience that he had made a mistake, and allow $20,000.00, or allow $5,000.00. You are tying yourself to the statement that I made that the damages were $14,000. That was an oral statement subject to modifications and correction, and——

Mr. Sager: I want to call the matter to your Honor's attention at this time. I think probably I will and should file a motion, direct a formal motion to correct the judgment, and I think under the rules that has to be done within ten days after entry of judgment, but I wanted to call it to your Honor's attention at this time to give the Court an opportunity to correct the judgment if it felt it should.

The Court: Well, the only correction that I would make in the judgment, might even then be quite technical, that this—in the findings, the way the sum is broken down. It might be that that might be modified, because all of these were very flexible items. The personal effects and damages sought

there was something like three or four thousand dollars. The Court allowed $750.00. The loss of earnings were substantially in excess of the amount the Court allowed.

I am *going have* you sign this as being presented by yourself——

Mr. Sager: If the Court signs the findings and the judgment at this time I would like exceptions included.

The Court: Very well. Do you desire to have the Court to note exceptions here on these——

Mr. Sager: Yes.

The Court: Now what is this item of costs?

Mr. Garland: $62.80.

The Court: Is that what the total costs are?

Mr. Garland: Yes, your Honor.

The Court: I thought it was $199.00.

Mr. Garland: No, just $99.00. It makes sixty-two eighty if the items are struck, which counsel made the motion for, and which I think he properly made the motion. It makes a total judgment of $16,162.80.

The Court: $62.00?

Mr. Garland: And 80c.

The Court: I have noted your exceptions on the judgment in this language, Mr. Sager:

"The defendant excepts to the foregoing judgment and exceptions allowed."

Mr. Sager: That is sufficient, your Honor. I think the exceptions should be noted in the findings and conclusions, as well.

The Court: I have made a notation on the findings and conclusions, the single notation:

"The defendant excepts to the foregoing findings and conclusions of law, and exceptions allowed."

Mr. Sager: That is satisfactory.

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,
Official Court Reporter.

[Endorsed]: Filed Feb. 12, 1948.

[Endorsed]: No. 11859. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Hobart E. Keith and Louise E. Keith, His Wife, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Western District of Washington, Southern Division.

Filed February 16, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11859

UNITED STATES OF AMERICA,

Appellant,

vs.

HOBART E. KEITH and LOUISE E. KEITH,
His Wife,

Appellees.

ORDER EXTENDING TIME TO FILE TRANSCRIPT AND DOCKET CAUSE

Good cause therefor appearing, It Is Ordered that the time within which the United States of America, appellant herein, may file the certified transcript of record and docket above cause in this court be, and hereby is extended to and including February 16, 1948.

/s/ FRANCIS A. GARRECHT,
Senior United States Circuit
Judge.

Dated: San Francisco, Calif., February 16, 1948.

[Endorsed]: Filed Feb. 16, 1948.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD FOR PRINTING

Comes now appellant and pursuant to subdivision 6, Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, herewith adopts the statement of points filed by it in the District Court upon which appellant intends to rely on appeal, and herewith designates the entire transcript of record as prepared and certified by the clerk of the District Court, to be printed for purposes of this appeal.

Dated this 19th day of February, 1948.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Attorneys for Appellant.

Service of the foregoing, by receipt of true copy thereof, is hereby acknowledged this 21st day of February, 1948.

/s/ A. J. HUTTON,
/s/ MARION GARLAND, JR.,
Attorneys for Plaintiffs-Appellees.

[Endorsed]: Filed Feb. 27, 1948.